No. 96-1007

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DONNA S. OLIVER, Administratrix of the Estate of ARTHUR DWAYNE OLIVER,

Petitioner,

v.

OSHKOSH TRUCK CORPORATION,

Respondent.

ERIK B. TATE and SHIRL D. O'BRIEN-TATE,

Petitioners,

v.

OSHKOSH TRUCK CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS L. SMALLWOOD
Counsel of Record
SHAWN M. EICHORST
BORGELT, POWELL, PETERSON & FRAUEN, S.C.
735 North Water Street
Milwaukee, Wisconsin 53202
(414) 276-3600
Attorneys for the Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Whether the Seventh Circuit correctly granted Oshkosh Truck Corporation summary judgment regarding Petitioners' design and failure-to-warn claims.

LIST OF INTERESTED PARTIES

The names of all parties to the proceedings appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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STATEMENT OF THE CASE

I. Nature of Case and Course of Proceedings

During the spring of 1991, while serving in Operation Desert Storm, Lance Corporal Arthur Oliver was a member of the Marine Corps with Company A, 8th Motor Transport Battalion, 2d Force Service Group. (R.1, ¶ 9) As part of his service, Oliver operated a Logistics Vehicle System truck MK-48 ("MK-48") manufactured by Oshkosh Truck Corporation ("Oshkosh"). On March 23, 1991, while operating a MK-48, Oliver lost control of the vehicle and crashed into several other MK-48s with which he was traveling in a convoy. Oliver died as a result of the crash. Corporal Erik B. Tate, who was a passenger in the MK-48 driven by Oliver, suffered serious injuries. Suit was subsequently brought against Oshkosh alleging various claims. Oshkosh sought, and was granted, summary judgment dismissing the Petitioners' claims in their entirety. This ruling was upheld by the Seventh Circuit. The Petitioners now seek a Writ of Certiorari from this Court.

II. Statement of Facts[1]

To properly understand the issues presented it is necessary to consider the process involved in the Marine Corps' procurement of the MK-48. During the 1970's and 1980's, the Department of Defense envisioned an ever increasing reliance on the Military Sealift Command and

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[1] Petitioners' overview of the facts was in many respects adverse to those cited by the underlying courts and not as expansive as Respondent feel necessary.

the commercial shipping fleet to support large scale military operations. (R.32, Ex. A, p. 2) Because the commercial shipping fleet was transforming from bulk cargo ships to container ships, and because the vehicles then available were inadequate in performance, the Marine Corps concluded that it needed to make appropriate changes in its logistics support system to adapt. (*Id.*) Accordingly, in the late 1970's the Marine Corps began the process of upgrading its tactical vehicle fleet. The MK-48, which was designed to perform the tasks of several different vehicles, ultimately became part of this upgrade. (*Id.* at 1)

In October, 1976, as a result of a study titled "Analysis of the Validity of a Conceptual Vehicle Mix as a Means of Providing Motor Transport Services to the Fleet Marine Forces," the Marine Corps began to develop a modern tactical vehicle fleet. (*Id.* at 3) The Marine Corps initial efforts to develop this fleet were not successful. For example, in 1977 the Marine Corps attempted to match then-available commercial tractors with various heavy haul trailers. (*Id.* at 7) It became readily apparent that the commercial tractors would not meet Marine Corps requirements. (*Id.*) On December 4, 1978, the Marine Corps publicly solicited responses from the heavy automotive and construction equipment industries that might meet the Marine Corps' requirements. (*Id.* at 8) Twenty-one companies, including Oshkosh, responded and a dialogue was opened with several of them. (*Id.*)

During this period of time, the Marine Corps developed performance specifications, selection criteria, and a test planning document for the needed vehicle and trailer. (*Id.*) The performance specifications and selection

criteria were sent to participating companies in July, 1979. (*Id.*) In March 1980, the Marine Corps initiated a military procurement process known as a "Request for Proposal" ("RFP") to find a manufacturer to build a prototype MK-48. (Dep. of Maj. John Wozniak, p. 14) The RFP defined the specification requirements – operational, performance, and containment. (*Id.* at 16) Eventually, ten companies, including Oshkosh, presented proposals for the project. (*Id.* at 9) The proposal vehicle by Oshkosh was made from a blank sheet of paper and was designed exclusively to meet the Marine Corps' specification requirements. (Dep. of Danny Lanzdorf, p. 17) In fact, the Marine Corps specifications were the baseline for the MK-48. (Wozniak dep., p. 64) The proposed vehicle was very unique and not commercial in any respect. (*Id.*)

Under the military procurement process, the Source Selection Evaluation Committee was responsible for evaluating the various proposals. (*Id.* at 32) The Committee consisted of non-contracting civilian and military engineers. (*Id.* at 33-34) The evaluation process was totally independent of the vendors. (*Id.*) Further, all proposals were subject to lengthy, in-depth evaluations by both the U.S. Army Tank Automotive Command and Marine Corps Headquarters. (R.32, Ex. A, p. 9) After the evaluations, both organizations reached the same conclusion: only the Oshkosh proposal was acceptable. (*Id.*) Consequently, the Committee recommended the procurement of two 22.5 ton prototype MK-48s from Oshkosh. The prototype contract was signed on September 18, 1980, and the prototypes were delivered to Camp Lejeune for Marine Corps testing and evaluating in April, 1981. (*Id.* at 14)

The Marine Corps managed the MK-48 acquisition with a team consisting of the following: *Acquisition Sponsor Project Officer*, who was responsible for developing, coordinating, and monitoring the engineering aspects and the integrated logistics support (operator and maintenance manuals) for each MK-48 (Wozniak dep., p. 17); *Development Project Officer*, who was responsible for taking the available research and development funds and researching and executing a development contract that would effectively test the prototype (*Id.* at 18); *Operational Test Project Officer*, who was responsible for insuring that all operational tasks were effectively planned, conducted, evaluated, and reported. (*Id.*) This Officer also prepared the test design and test plan, supervised operational testing, and evaluated and analyzed the results. (*Id.*) The Marine Corps established testing procedures and controlled and conducted all testing on the prototypes submitted by Oshkosh. (*Id.* at 22) The specification requirements and testing criteria were outlined in the prototype contract. The prototypes were built only after extensive discussions between military representatives, military engineers, and Oshkosh engineers. (R.32, Ex. C)

The Marine Corps' testing procedures evaluated the development and engineering design of the vehicle. (Wozniak dep., pp. 23, 42; *See also*, R.32, Ex. C, Operational Testing Plan, pp. 1-3) The testing was broken up into three categories: operational, performance, and developmental. (Wozniak dep., pp. 29-30) Extensive testing was performed by the Marine Corps at a number of locations, including Camp Lejeune, Camp Pendleton, Isle of Palms, Aberdeen Proving Grounds, and Quantico. (*Id.* at 28) It is important to note that the Marine Corps did

not consider crash testing any of the vehicles. (*Id.* at 181-182)

Based on test results, the Marine Corps determined that a large number of modifications needed to be made before production could begin on the MK-48. (*Id.* at 20) The tests provoked substantial discourse between the Marine Corps and Oshkosh regarding all aspects of the MK-48 including problems and their eventual solution. (*Id.* at 25) Thirty (30) million miles of testing was done on the MK-48 vehicle. (*Id.* at 138) There were literally hundreds and hundreds of changes during the development of the MK-48 vehicle from the initial prototype through final production, and Oshkosh carried out each one through continuous dialogue with the Marine Corps. (*Id.* at 25, 26-31; *See also*, R.32, Ex. D – list of modifications ordered by the Marine Corps)

The Marine Corps was responsible for the location and the type of fuel tanks on the MK-48. (Lanzdorf dep., p. 43) The Marine Corps specified that the fuel system had to meet Federal Motor Carrier Safety Regulation requirements 383.65 and 393.67. However, the Marine Corps did not make any request for changes in the location of the fuel tanks or exhaust system in order to obtain compliance with these requirements. (Wozniak dep., pp. 30-31) In fact, the exhaust system and fuel tanks on the prototype MK-48 remained in the same location throughout the design and development process, and the Marine Corps was completely aware of this important fact. (*Id.* at 30; R.40, Ex. E-Wozniak dep. Exhibit 31 which shows the exhaust system was 7.6 cm from the fuel cap)

Before final production, the Marine Corps decided it wanted to use "Explosafe" material in the fuel tanks. (Lanzdorf dep., p. 43) The Marine Corps then changed its mind and specified "Scott Foam" material. (*Id.* at 43) Both these materials are explosion suppressants. At the Marine Corps request, Oshkosh designed them into the fuel system. However, just before final production, the Marine Corps decided to eliminate any type of explosion suppressant material from the fuel system design. (*Id.* and Wozniak dep., p. 41) The Marine Corps also considered and decided not to use armor material around the fuel tanks. (*Id.* at 42-47 and Wozniak dep., p. 28)

Once the MK-48 design had been modified sufficiently to pass Marine Corps testing, Oshkosh was awarded the Production Contract on September 16, 1983. The final production specification and dimension requirements were set forth in the Production Contract. (R.32, Ex. E) The fuel tanks on the MK-48 were provided to Oshkosh by Cutler Metal Product Company. Cutler certified that the fuel tanks and liquid fuel system met FMCSR 393.65 and 393.67. (Lanzdorf dep., p. 80) Oshkosh also certified that the fuel tanks and liquid fuel system conformed to FMCSR. (*Id.* at 77) Additionally, although the Marine Corps did not require certification with regard to the exhaust system, the exhaust system did comply with FMCSR 393.83. (*Id.*)

The exhaust and fuel system had already been designed and tested before the signing of the Production Contract and therefore no changes could be made without express government approval. (Wozniak dep., p. 59)

The placement of the exhaust and fuel system was provided by the Marine Corps' various specification requirements. (*Id.* at 37-38, 66) Initially, Oshkosh tried to put the exhaust system on the right side of the vehicle away from the fuel tank, which was planned to be on the left side. However, when the military insisted on having a larger fuel capacity, fuel tanks were added on both sides. (Dep. of Herbert Dobbs, p. 115). Therefore, this ruled out putting the exhaust on the opposite side of the fuel tank. Next, because of the performance specification that the MK-48 be able to ford through 5 feet of water, the fuel tank and engine needed to be located at least 60" above ground. (Lanzdorf dep., p. 38) Also, because of the performance specification that required the MK-48 to fit in a container 8' x 8' x 20', the exhaust and fuel systems needed to fit in an 36" envelope – located between 60" and 96" off the ground. (*Id.*) In order to meet these specifications, the exhaust system was designed to lie horizontally over the top of the fuel tank within the 36" constrained area. Therefore, when you take into account the diameter of the exhaust system that is approximately 12", the space that is available to put the exhaust in the already compact area is further limited. (*Id.* at 38)

It is important to note that during the initial design of the MK-48 the exhaust system was located at a greater distance away from the fuel tank. (*Id.* at 40) That was because the overall height that the military was requesting was 102". Thereafter, the Marine Corps changed this specification and reduced the overall height from 102" down to 96". Thus, the exhaust system was moved 6" closer to the fuel tank. (*Id.*)

The height restrictions dictated the placement of the exhaust system. The overall height of the MK-48 when connected to the front end module is 102", but when the vehicle is disconnected, the yaw strut on the front power unit is used to tilt the vehicle so that the radiator line and the exhaust line come into plane with the 96" line. Therefore, the exhaust and radiator systems slope rearward at an angle so that when the vehicle is tilted forward, it can be packaged in a container within the 96" requirements. (*Id.* at 57) If the government thought there was a problem with the exhaust and fuel system configuration, they would have taken exception to the configuration and had authority to change it. (Wozniak dep., pp. 65, 181; Dobbs dep., p. 73)

Pursuant to the Production Contract, Oshkosh presented the Marine Corps with a drawing package that specifically showed the location of the exhaust system and fuel tanks. The drawings were prepared through a collaborative effort between the Marine Corps and Oshkosh. Furthermore, this package depicted the precise location of warnings on the MK-48. (R.40, Ex. B; Lanzdorf dep., p. 97; and Wozniak dep., pp. 66-67) The Contract also required Oshkosh to provide a "Safety Assessment Report." (R.32, Ex. G) The purpose of the Safety Assessment Report was for Oshkosh to provide an evaluation of the safety risks existing during the test and operation of the vehicles. The report identifies safety features and procedural hazards and precautions that should be followed. Specifically, Oshkosh's Safety Assessment Report provided that "Fuel is very flammable and can explode easily" . . . "Fuel can be ignited by hot engine." (R.32, Ex.

G-1) The Marine Corps also performed their own safety assessments. (Wozniak dep., p. 181)

The Production Contract prohibited Oshkosh from making any changes to the MK-48 without the express approval of the Marine Corps. The various contracts also specified elaborate procedures for the control and monitoring of the configuration of the MK-48. (Wozniak dep., pp. 59-60) Each proposed change was thoroughly reviewed by the Marine Corps before implementation. (*Id.* at 62) The Marine Corps instituted a "total design responsibility" clause into the Production Contract, but the provision was simply boiler plate language taken from Army contracts. (*Id.* at 59-60, 62, 70-75) In fact, the design was frozen at the time the total design responsibility language was agreed upon and the Production Contract was signed. (Dep. of Lloyd Rank, pp. 128, 157, 65; R.32, Ex. E, C.6.1, p. 37)

Finally, the Production Contract required a Marine Corps representative to inspect each completed MK-48 vehicle. (*Id.* at 60; *See also,* R.32, Ex. E3) The Marine Corps representative was authorized to accept or reject the vehicle. A vehicle that did not comply with the Marine Corps specifications would be given back to Oshkosh for corrections. (*Id.* at 61) Ultimately, the Marine Corps purchased about 1,600 vehicles from Oshkosh in 1988. (*Id.* at 66) In sum, the MK-48 was the product of extensive coordination between private and government research entities spanning sixteen (16) years and costing some $7.5 million in private research funds and $5 million in government research and development money. (R.32, Ex. A, p. 13)

ARGUMENT FOR DENYING WRIT OF CERTIORARI

I. THE SEVENTH CIRCUIT CORRECTLY FOUND THAT THE GOVERNMENT CONTRACTOR DEFENSE APPLIED TO PETITIONERS' FAILURE-TO-WARN CLAIM.

A. OSHKOSH SUBMITTED PROPOSED WARNINGS TO THE MARINE CORPS WHICH THE MARINE CORPS SUBSTANTIVELY EVALUATED, APPROVED, AND TO WHICH THE VEHICLES CONFORMED.

The district court ruled that:

> the undisputed facts show that Oshkosh submitted proposed warnings to the Marine Corps which the Marine Corps subsequently approved in part. The approval was not merely a rubber stamp but the result of an extensive dialogue between Oshkosh and the Marine Corps. The vehicles provided by Oshkosh conformed to the specifications, including those regarding warnings, approved by the Marines Corps. And, finally, Oshkosh did not fail to warn the Marine Corps of any dangers in the use of the MK-48 that were known to Oshkosh but not to the Marine Corps.

(App., p. 80a) Similarly, the Seventh Circuit ruled that:

> upon examination of the record, we believe that the district court properly granted summary judgment to the defendant. We believe that the undisputed facts of the record show that Oshkosh complied with "reasonably precise specifications" imposed on it by the Marine Corps with respect to the warnings on the MK-48 and that the contractor provided those

> warnings required by the government. . . . With respect to the final element of the government contractor defense, we note our earlier conclusion that Oshkosh did not fail to warn the Marine Corps of any dangers in the use of the MK-48 that were known to Oshkosh but not to the Marine Corps. Under these circumstances, the district court properly entered summary judgment to Oshkosh on the plaintiffs' failure-to-warn claims.

(App., p. 25a) In rendering these decisions the underlying federal courts disagreed with Petitioners' assertion that in order for the government contractor defense to apply to failure-to-warn claims, the contractor must show that the government either prohibited warnings or dictated the content of the warnings. The courts closely followed the government contractor defense criteria outlined by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 101 L.Ed.2d 442 (1988).

There is little question that under appropriate circumstances the government contractor defense is applicable to failure-to-warn claims. However, Petitioners argue that the Seventh Circuit's ruling is flawed and that there is a conflict in authority with respect to the application of the government contractor defense to failure-to-warn claims. In contrast, Respondent submits that the Seventh Circuit correctly applied the government contractor defense based on the undisputed facts and further that no genuine and/or intolerable conflict is presented by the lower federal court.

Before addressing Petitioners' conflicting authority argument, it is important to first set forth why and how

the *Boyle* case is applicable to both design defect and failure-to-warn claims. The government contractor defense, a discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. Sec. 2680(a), ("FTCA"), provides government contractors immunity from liability. In other words, the government contractor defense is derived from the government's immunity from suit when the performance of a discretionary function is at issue. This Court in *Boyle* affirmatively recognized and defined the scope, purpose and requirements that need to be met in order for the government contractor defense to apply. This Court held that work performed by an independent contractor for the federal government is an area of "uniquely federal interest" and that the selection of the appropriate design for military equipment is assuredly a "discretionary function" not subject to suit. *Boyle*, 487 U.S. at 504. This Court explained:

> It [discretionary function] often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments, see *U.S. v. Varig Airlines*, 467 U.S. 797, 814, 104 S. Ct. 2755, 2765, 81 L.Ed.2d 660 (1984), through state tort suits against contractors would produce the same effects sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover,

> or to insure against, contingent liability for the government-ordered designs. To put the point differently: It makes little sense to insulate the government against financial liability for the judgment that a particular feature of military equipment is necessary when the government produces the equipment itself, but not when it contracts for the production. In sum, we have the view that state law which holds government contractors liable for design defects in military equipment does in some circumstances present "significant conflict" with federal policy and must be displaced.

Id. at 511-12.

This Court premised the application of the government contractor defense on a "significant conflict" between state law and an area of federal concern, such as the procurement of military equipment. *Id.* at 507. The requisite "significant conflict" need not be as sharp as the clearer need for the federal government to regulate, for example, commercial paper. However, a certain degree of conflict must exist before pre-emption and the government contractor defense are triggered. *Id.* This Court established a three-part test to determine if the government contractor defense applies:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers and the use of the equipment that were known to the supplier but not to the United States.—

Id. at 512. The first two elements of the *Boyle* test ensure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third element is necessary to eliminate any incentive that the government contractor defense may create for contractors to withhold knowledge of risks. *Id.* This is precisely the test followed by the Seventh Circuit in this case.

In reaching its decision the Seventh Circuit concluded that the three-part *Boyle* test provides guidance in determining if a conflict exists and when state law governing a failure-to-warn claim can be displaced. The court ruled that:

> because similar policy considerations control both design defect and failure-to-warn situations, *Boyle* provides substantial guidance in determining whether state law governing a failure-to-warn claim can be displaced. *See Id.* at 1157. In both cases, the discretionary aspect of the federal government's contracting function must define the boundaries of the government contractor defense. *See Boyle*, 487 U.S. at 511-12. In *Boyle*, the Supreme Court established the requirement that the 'government approve reasonably precise specifications' as the test of whether a particular case implicates a discretionary function of the government. 487 U.S. at 512. We believe that the same touchstone ought to govern in the context of failure-to-warn claims. As the Sixth Circuit put it, '[w]hen the government exercises its discretion and approves designs prepared by private contractors, it has an interest in insulating its contractors from liability for such design defects.

> Similarly, when the government approves warnings intended for users, it has an interest in insulating its contractors from state failure-to-warn tort liability.' *Tate*, 55 F.3d at 1157. Thus, when state law would otherwise impose liability for a failure-to-warn, that law can be displaced when the contractor can show that: (1) government exercised its discretion and approved certain warnings; (2) the contractor provided the warnings required by the government; (3) the contractor warned the government about dangers in the equipment's use that were known to the contractor but not to the government.

(App., pp. 23a-24a).[2]

The underlying federal courts in this case have adopted the *Boyle* rationale as guidance and overwhelmingly decided that Oshkosh has met its burden of proof with respect to the government contractor defense regarding Petitioners' failure-to-warn claim. The Seventh Circuit determined that Oshkosh submitted proposed warnings to the Marine Corps which the Marine Corps substantively evaluated, approved and to which the MK-48 conformed.[3] Further the court ruled:

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[2] It is apparent from the Seventh Circuit's ruling that they researched and analyzed the failure-to-warn issue extensively. In fact, they were critical of a number of the same cases cited by the Petitioners. (App., 24a, Fn. 8). The court said it was more prudent to impose a burden on the contractor similar to that announced in *Boyle* because FTCA's discretionary function exemption delineates the contours of the defense.

[3] The authority cited by Petitioners in *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989), has no bearing on this case and is factually dissimilar. The *Dube* case discussed the government's (Navy) duty to warn not a contractor's.

> that the undisputed facts of record show that Oshkosh complied with 'reasonably precise specifications' imposed on it by the Marine Corps with respect to the warnings on the MK-48 and that the contractor provided those warnings required by the government. In this respect, Oshkosh invites us to the affidavit of Danny J. Lanzdorf, Oshkosh's Chief Engineer for the MK-48. Paragraph 2 of his affidavit provides that '[h]undreds of plans, drawings and specifications were submitted to the U.S. Marine Corps, but the [drawings] attached [to the affidavit] are representative of those reviewed and approved.' R.40, Ex.B, at Par. 2. The drawings attached to the affidavit show several different views of the MK-48 and depict the location of the warnings and component parts such as the exhaust system, mufflers and the fuel tank. With respect to the final element of the government contractor defense, we note our earlier conclusion that Oshkosh did not fail to warn the Marine Corps of any danger in the use of the MK-48 that were known to Oshkosh but not to the Marine Corps.

(App., p. 25a). It is clear that the Marine Corps was intimately aware of the proximity of the exhaust system and the fuel tanks, and any alleged inherent danger. To suggest otherwise would be ridiculous, considering the Marine Corps' extensive involvement in the procurement of the MK-48. *See also, Stout v. Borg-Warner Corp.*, 93 F.3d 331, 337 (5th Cir. 1991), where the court ruled that the contractor has no duty to warn of obvious hazards.

Finally, Petitioners' argument on page 11 of their brief is without merit mainly because it mischaracterizes the Seventh Circuit's decision on the warning issue. The

Seventh Circuit's decision on page 17a dealt with the final element of the *Boyle* test as it pertained to the Petitioners' design defect claim. There the court found that Oshkosh did not possess any greater knowledge than the Marine Corps about the likelihood of an exhaust-ignited fuel fire arising from a collision. (App., p. 17a) The court did not find that the warnings failed to show that the Marine Corps was aware of the danger of the exhaust system configuration, as asserted by the Petitioners. As stated above, the undisputed facts show that Oshkosh complied with reasonably precise specifications imposed on it by the Marine Corps with respect to the warnings on the MK-48 and that Oshkosh provided those warnings. (App., p. 25a)

B. NO GENUINE CONFLICT IN AUTHORITY EXISTS REGARDING THE APPLICATION OF THE GOVERNMENT CONTRACTOR DEFENSE TO FAILURE-TO-WARN CLAIMS.

The Seventh Circuit elected to follow the *Boyle* rationale or principle more closely than other courts, however, this does not create a conflict in authority.[4] Most courts recognize that the government contractor defense may apply to failure-to-warn claims and, in making this decision, they assess the amount of government discretion involved in the warnings process. In fact, in one way or

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[4] No genuine or plain conflict exist among the federal courts on the failure-to-warn issue and most of the decisions turn on the unique facts presented in each case. *Kamberos v. GTE Automatic Electric, Inc.*, 454 U.S. 1060, 102 S. Ct. 612, 70 L.Ed.2d 599 (1981).

another they rely on the *Boyle* rationale when determining whether the government contractor defense applies to failure-to-warn claims.

The cases cited by the Petitioners are factually distinguishable from this case and must be closely scrutinized. First, a number of the cases do not stand for the proposition set forth by the Petitioners. Secondly, all the decisions are based on the facts and circumstances unique to each case. Finally, some of the cases cited simply define the government contractor defense too narrowly. For example, the Second Circuit's ruling in *In re: Joint E. & S. District New York Asbestos Litigation*, did not definitively provide that the government must dictate or prohibit warnings. The court simply said that the government must remain the agent of decision which the Marine Corps has in this case. *New York Asbestos*, 897 F.2d 626, 630 (2d Cir. 1990). The Fifth Circuit's ruling in *In re: Air Disaster At Ramstein Air Base Germany*, did not make a precedential ruling as petitioners assert. But found that the government contractor defense may apply to failure-to-warn claims if there is evidence that the government was involved in the decision to give or not to give a warning. Actually, the court looked to *Boyle* when it reviewed whether the government exercised sufficient discretion with respect to warnings. *In re: Air Disaster*, 81 F.3d 570 (5th Cir. 1996).[5]

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[5] Recently the Fifth Circuit clarified its decision in this case by ruling that under Georgia law a manufactuer does not have a duty to warn the military or pilots of dangers inherent in the design of the aircraft in question. 88 F.3d 341 (5th Cir. 1996). *See also, McCoy v. Unisys Corporation*, 1996 U.S. District LEXIS 4349, wherein a district court in the Fifth Circuit ruled against

The Ninth Circuit ruling in *Butler v. Ingalls Shipbuilding, Inc.*, also follows *Boyle* closely and is not as rigid as Petitioners submit. The court ruled that the government contractor defense may apply to a state failure-to-warn claim where the evidence shows that the contractor was "acting in compliance with 'reasonably precise specifications' imposed on it by the United States." *Butler*, 89 F.3d 582, 586 (quoting *In re Federal Asbestos Cases*, 960 F.2d at 813 (quoting in turn *Boyle*, 487 U.S. at 512)) (citing *In re New York Asbestos Litigation*, 897 F.2d at 629-32).[6] Finally, the Eleventh Circuit in *Dorse v. Eagle-Pilcher Industries, Inc.*, 898 F.2d 1487 (11th Cir. 1990), did not make an outright ruling that the government must prohibit or dictate warnings. In fact, in that case the government was not at all involved in the warning process. It is easy for the courts to reach a decision when the government is not involved in the warning process because the courts do not need to conduct any kind of analysis to determine if

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Petitioners' proposed restrictive view of the government contractors defense.

[6] A similar decision was reached by the same circuit in *In re: Hawaii Federal Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992). In that case the court decided that asbestos was not military equipment and thus the contractor was not entitled to the government contractor defense. The government was not involved in the warning process which is generally consistent with all the asbestos cases cited by Petitioners. Petitioners mainly rely on asbestos cases to support their agruments. However, a recent district court has intimated that the policy considerations driving application of the governement contractor defense are not present in asbestos cases. *Good v. Armstrong World Industries, Inc.*, 914 F. Supp. 1125 (E.D.Pa. 1996) (court indicates that it is common knowledge that asbestos is dangerous)

the government exercised sufficient discretion over the warning process. This of course is not the case with respect to Oshkosh and the Marine Corps, where it is undisputed that the Marine Corps was substantially involved in the warnings process.[7]

The *Russek* case is a decision based solely on the facts and circumstances unique to it and does not set forth a separate test. In the *Russek* case the district court ruled that a failure-to-warn claim is a defect in the design of a product pursuant to New Jersey law and thus the government contractor defense was applied equally to both the plaintiff's design defect and failure-to-warn claims. The only part of this case that is helpful is that the court utilized the *Boyle* analysis and ruled that government approval (discretion) is necessary, not creation of warning specifications. *Russek v. Unisys Corp.*, 921 F. Supp. 1277, 1294 (D.N.J. 1996).[8]

Contrary to Petitioners' belief, there is not a genuine and/or intolerable conflict. As outlined above, the court's

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[7] Nor is this the case in *Tate v. Boeing Helicopters*, 55 F.3d 1150 (6th Cir. 1995). *See also, Wisner v. Unisys Corp.*, 917 F. Supp. 1501 (D.Kan. 1996), *Andrew v. Unisys Corp.*, 936 F. Supp. 821 (W.D.Okl. 1996), and *Fagans v. Unisys Corp.*, 945 F. Supp. 3 (D.D.C. 1996). Contrary to the cases cited by the Petitioners these are cases where the courts were faced with actually assessing active government involvement in the warning process.

[8] Respondent draws this Court's attention to footnote 8 in *Russek* as further support for our position that asbestos cases are unique and distinguishable from the procurement of other military equipment.

decisions vary based on the facts and circumstances surrounding each procurement of military equipment.[9] It is clear from analyzing these cases that the courts are attempting to measure governmental discretion by utilizing some form of the *Boyle* rationale. Therefore, as long as the government considers and approves warnings, as they have in the present case, the government contractor defense will apply. In other words, the Marine Corps does not have to dictate the warnings. It is sufficient that the Marine Corps exercised discretion over the warnings, as they did over the entire procurement process.

In sum, the government contractor defense applies to Petitioners' failure-to-warn claim. Liability for a failure-to-warn claim would have the same negative effect in military procurement as a design defect claim outlined in *Boyle*. The Marine Corps' consideration and approval of the warnings is representative of the required governmental discretion outlined in *Boyle*. The facts are undisputed concerning the Marine Corps in-depth and extensive involvement in the design and testing of the MK-48. The Marine Corps and Oshkosh designed and built the MK-48 from a blank sheet of paper to be used by the Marine Corps in the carrying out of national defense. The Marine Corps was intimately involved in the review and approval of all warnings placed on the MK-48 and the evidence provided by Oshkosh still goes unrefuted today. (*See*, R.40, Ex.B). Therefore, the Seventh Circuit was correct in ruling that the Marine Corps exercised its

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[9] Interpreting discretionary function of the government should be decided on a case by case basis. *U.S. v. Varig Airlines*, 467 U.S. 797, 104 S. Ct. 2577, 81 L.Ed.2d 660 (1984).

discretion and approved certain warnings; that Oshkosh provided those warnings; and finally that Oshkosh warned the government about dangers known to them but not the Marine Corps.[10]

II. THE SEVENTH CIRCUIT CORRECTLY INTERPRETED THE GOVERNMENT CONTRACTOR DEFENSE AND GRANTED OSHKOSH SUMMARY JUDGMENT REGARDING PETITIONERS' DESIGN DEFECT CLAIMS.

With respect to Petitioners' design defect claim, the Seventh Circuit conducted an extensive analysis of the record and determined that Oshkosh had met its burden of proof on each element of the *Boyle* test and thus was entitled to summary judgment based on the government contractor defense. (App., pp. 9a-21a) However, Petitioners summarily argue that neither of the underlying federal courts followed its appropriate judicial role in

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[10] The uncontroverted facts establish that the Marine Corps, which had exclusive authority over the use of the MK-48 and the employment and training of its operators, was in a markedly superior position to monitor the effects of the use of the vehicle, and was, in fact, in possession of at least as much information on the dangers associated with the use of the MK-48 as Oshkosh. Additionally, it is clear that the Marine Corps was responsible for the selection and implementation of all testing but chose not to conduct any crash test. The Marine Corps did test for safety and human factors; however, they were not concerned with how the MK-48 would perform in a crash. (Wozniak Dep., p. 138 & Lanzdorf Dep., p. 86). Finally, there is no evidence of record to suggest Oshkosh was aware of any fires or explosions arising from any collision involving a MK-48. (App., p. 17a).

applying the *Boyle* test and summary judgment standards.[11] The government contractor defense is not solely a defense of fact, and courts can and have made rulings as a matter of law.[12] In fact, Oshkosh established each

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[11] Petitioners argue that a conflict exist among Circuits based on the application of the government contractor defense to failure-to-warn claims. However, there is no conflict as pointed out above. Aside from that issue, the Petitioners simply want this court to re-evaluate the lower courts' assessement of the facts. But this Court has consistently indicated that it does not grant certiorari to review evidence and specific facts – "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 69 S. Ct. 535, 93 L.Ed. 672 (1949). *See also, U.S. v. Johnston*, 268 U.S. 220, 45 S. Ct. 496, 69 L.Ed. 925 (1925), and *Texas v. Mead*, 465 U.S. 1041, 104 S. Ct. 1318, 79 L.Ed.2d 714 (1984).

[12] A review of the Seventh Circuit's decision indicates that it followed the principles handed down by *Boyle* and many other similar cases on point that have granted summary judgment. For example, the following is a list of cases that have followed the same *Boyle* approach and granted the government contractor's defense immunity on summary judgment grounds: *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3rd Cir. 1990); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019 (S.D. Ill. 1989); *Sundstrom v. McDonnell Douglas Corp.*, 816 F. Supp. 587 (N.D. Calif. 1993); *Lewis v. Babcock Industries, Inc.*, 985 F.2d 83 (2nd Cir. 1993); *Tozer v. L.T.V. Corp.*, 792 F.2d 403 (4th Cir. 1986); *Kleeman v. McDonnell Douglas Corp.*, 890 F.2d 698 (4th Cir. 1989); *Tate v. Boeing Helicopters*, 55 F.3d 1150 (6th Cir. 1995); *Wisner v. Unisys Corp.*, 917 F. Supp. 1501 (D.Kan. 1996); *Andrew v. Unisys Corp.*, 936 F. Supp. 821 (W.D.Okl. 1996), and *Fagans v. Unisys Corp.*, 945 F. Supp. 3 (D.D.C. 1996); *Butler v. Ingalls Shipbuilding Inc.*, 89 F.3d 582 (9th Cir. 1996); *In re: Air Disaster at Ramstein Germany*, 81 F.3d 570 (5th Cir. 1996); and *Russek v. Unisys Corp.*, 921 F.

element of the government contractor defense. In turn the Petitioners failed in their burden to present positive/affirmative evidence refuting the proffered evidence.[13]

The Petitioners virtually reassert the same arguments to this Court as they made to the underlying federal courts. Petitioners argue that issues of fact exist as to each element of the government contractor defense and therefore summary judgment is inappropriate. However, contrary to Petitioners' belief, the Seventh Circuit did not consciously overlook or fail to consider information provided to them with respect to each element of the government contractor's defense. In fact, the Seventh Circuit in analyzing the first element of the *Boyle* test determined that the Marine Corps approved reasonably precise specifications on the MK-48. The court ruled that:

> The government's participation in the design of the MK-48 was, in both a procedural and substantive sense, extensive. Procedurally, the design of the MK-48 evolved through a cooperative and 'continuous back and forth' between the Marine Corps and Oshkosh. *Harduvel*, 878 F.2d at 1320. The Marine Corps also exercised, through a detailed set of performance and dimension specifications, a considerable amount of substantive input into the design of the MK-48. The design process, viewed as a whole,

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Supp. 1277 (D.N.J. 1996). In sum, the government contractor defense is not solely a question for the trier of fact and can and has been decided as a matter of law.

[13] If the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986).

establishes that the Marine Corps made a series of discretionary decisions concerning the design of the MK-48 and its suitability for military mission requirements.

The evidentiary material submitted to the district court established that Oshkosh and the Marine Corps worked closely together on the development of the MK-48 – from its planning stages through full production. The initial proposal called for the exhaust system to be placed on the right side of the vehicle, away from the single 55 gallon fuel tank on the left side. When the Marine Corps insisted on having a larger fuel capacity, however, a second tank was added to the right side of the vehicle. A second increase in the fuel capacity requirement resulted in the expansion of the twin fuel tanks to 75 gallons each, crowding the exhaust system even further. At one point during the design process, moreover, the government reduced the overall height limitation from 102 inches to 96 inches. This change in the height specification required the exhaust pipe, which lies directly above and parallel to the right side fuel tank, to be moved six inches closer to the fuel tank. It is clear, therefore, the Marine Corps did not leave 'the critical design decisions to the private contractor,' *Trevino*, 865 F.2d at 1480, but rather that the Corps worked with Oshkosh every step of the way. *See*, *Harduvel*, 878 F.2d at 1320; *Kleeman*, 890 F.2d at 700-01.

The Marine Corps needed the MK-48 to have two 75 gallon fuel tanks; the ability to ford through five feet of water; the ability to restart a stalled engine while fording; the ability to fit into an eight foot by eight foot by twenty foot

> shipping container, and the ability to be transported externally by helicopter. This combination of specifications cabined significantly the placement of the exhaust system and the fuel tanks. Each 75 gallon fuel tank requires over ten cubic feet of space, and the exhaust pipe itself is approximately twelve inches in diameter. The district court was justified in concluding, as a matter of law, that this combination of specifications prevented Oshkosh from complying 'both with its contractual obligations and the state-prescribed duty of care.' . . . Nor does the fact that Oshkosh may have retained some discretion to position the fuel tanks and exhaust system within the envelope permitted by the specifications, stand alone, defeat the government contractor defense. . . .
>
> The record in this case supports the District Court's conclusion that, given the Marine Corps involvement in the design process and its substantive input, the configuration of the field and exhaust systems amount to the type of deliberate trade-off between military mission requirements and safety concerns that is at the heart of the government contractor defense.

(App., pp. 10a-13a)

Government discretion, not government design, is the key to the government contractor defense. Therefore, the fact that the Marine Corps delegated "total design responsibility" to Oshkosh is immaterial. Petitioners have time and time again argued that the Marine Corps' delegation of "total design responsibility" to Oshkosh precludes Oshkosh in one way or another from asserting the government contractor defense. However, the trial court

and Seventh Circuit have found Petitioners' argument to have no basis in the law or facts.[14]

The Seventh Circuit determined that the second element of the *Boyle* test was met since the MK-48 conformed to the reasonably precise specifications set forth by the Marine Corps. Once again, contrary to Petitioners' belief, the underlying courts specifically assessed whether the configuration of the exhaust system and fuel tanks conformed to the reasonably precise specifications placed upon Oshkosh by the Marine Corps. In reaching its decision, the Seventh Circuit ruled that, "Oshkosh did not deviate from the Marine Corps specifications; rather, the configuration of the fuel tanks and the exhaust system was determined, to a significant extent, by the Corps' dimension, performance and operation specifications." (App., p. 16a) In other words, the placement of the exhaust system and the fuel tanks satisfied an intended configuration.[15]

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[14] The Seventh Circuit ruled out Petitioner's total responsibility clause argument both based on the timing of the production contract as well as the conduct of the parties. (App., p. 13a)

[15] On page 19 of Petitioners' brief, they suggest the Seventh Circuit ruled that, because it had previously found that the government approved reasonably precise specifications, it was foreclosed from determining that the design did not meet contract specifications. This is a complete mischaracterization of the court's decision and a thorough reading and analysis of the decision points this out. The Marine Corps was aware of the configuration of the exhaust system and fuel tanks and ultimately approved the design. (*Wozniak* dep., pp. 59, 66-67; *Lanzdorf* dep., p. 97; *See also*, R.40, Ex. B and Ex. E) The Petitioners fail to realize that this project was not created in a

The final element of the *Boyle* test requires Oshkosh to have warned the Marine Corps about the dangers in the use of the MK-48 that were known to Oshkosh but not to the Marine Corps. The Seventh Circuit specifically ruled that Oshkosh was not aware of any dangerous configuration of the fuel tanks and exhaust system that the Marine Corps was not. Furthermore, Oshkosh did not possess any greater knowledge than the Marine Corps concerning the likelihood of an exhaust-ignited fuel tank fire following a side-impact collision. (App., p. 17a)[16] The bottom line is that the Marine Corps was completely aware of the configuration of the exhaust and fuel system (it was open and obvious) and ultimately approved the design even though they had complete authority to change the design if desired. (Wozniak dep., p. 181) Finally, the court determined that to the extent Oshkosh was aware of a danger from the ignition of fuel, the warning contained in Oshkosh's Safety Assessment Report was sufficient to communicate the danger to the

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vacuum. In other words, there were other specifications which had to be met in order to reach the Marine Corps design and performance goals, and that is why Oshkosh was forced to place the exhaust system in close proximity to the fuel system. Moreover, the Marine Corps' review, testing and approval of the MK-48 design prior to final production, is evidence that the design conformed to Marine Corps specifications.

[16] Once again, the Petitioners completely mischaracterize the decisions handed down by the district court and Seventh Circuit on page 20 of their brief. The district court and Seventh Circuit both concluded that Oshkosh was not aware of any danger associated with the configuration of the fuel tanks and exhaust system that the Marine Corps was not. In other words, Oshkosh and the Marine Corps possessed the same knowledge about the exhaust system and fuel tank configuration.

government for purposes of the government contractor defense. (App., pp. 17a-18a)

The record contains unrebutted evidence that Oshkosh disclosed all known dangers regarding the MK-48. As discussed earlier, the Marine Corps was responsible for the selection and implementation of all testing, and if none was done with regard to determining whether the exhaust was likely to ignite the fuel supply, that decision rested within the Marine Corps. The Marine Corps has exclusive authority over the use of the MK-48 and the employment and training of its operators, which places them in a markedly superior position to monitor the effects of the testing and use of the vehicle. In fact, the Marine Corps elected not to conduct any crash tests with the MK-48. Finally, there is no evidence which suggests that Oshkosh was aware of any fires or explosions arising from any collisions involving a MK-48 before this accident. *Boyle* does not require the contractor to warn the government of every possible danger – only those known to it – and not to the government. *Boyle*, 487 U.S. at 512. Based on the above, the Seventh Circuit was justified in concluding that all three elements of *Boyle* test was satisfied as a matter of law.

CONCLUSION

For all the reasons set forth above, the Respondent respectfully requests that the Court reject Petitioners' request for a writ of certiorari.

Respectfully submitted,

THOMAS L. SMALLWOOD
Counsel of Record for Respondent
SHAWN M. EICHORST
BORGELT, POWELL, PETERSON
& FRAUEN, S.C.
735 North Water Street, Suite 1500
Milwaukee, WI 53202
(414) 276-3600